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IN THE

Supreme Court of the United States

October Term, 1964

No. 529

NICHOLAS GUARRACINO,

Petitioner,

against

LUCKENBACH STEAMSHIP COMPANY, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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LUCKENBACH STEAMSHIP COMPANY, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit to review its order and judgment herein entered the 25th day of June, 1964.

Opinions Below

333 F. 2d 646—Opinion of Court of Appeals.

District Court opinion (Levet, D.J.) appended to record below, 33a-41a.

Jurisdiction

The Court of Appeals order herein was dated and entered June 25th, 1964.

Jurisdiction of this Court to review the subject order by writ of certiorari is predicated on 28 U. S. C. 1254(1).

Questions Presented

1. Is not the holding by the Court of Appeals for the Second Circuit in the instant case contrary to the holdings by the Court of Appeals for the Third Circuit in the cases of *Ferrante* v. *Swedish American Lines*, 331 F. 2d 571 and *Thompson* v. *Calmar S.S. Corp.*, 331 F. 2d 657, and inconsistent with the holding by this Court in *Gutierrez* v. *Waterman*, 373 U. S. 206, 83 S. Ct. 485, in treating with the question of negligently and non-negligently created unseaworthiness proximately causing maritime injuries.[1]

Statement

District Court jurisdiction was based on 28 U. S. C. 1332.

Petitioner, while employed as a longshoreman aboard respondent's vessel, was caused to fall and suffer injuries through respondent's failure to have a reasonably safe means of exit from the hatch where petitioner was performing his work aboard the vessel.

Petitioner's evidence established that three ladders exiting from the hatch were all blocked by cargo (Record below, 9a-10a) and that petitioner had to step on cargo to reach the hatch coaming to leave the hatch at quitting time (Record below, 8a).

While trying to pull himself over the coaming, petitioner slipped and fell (Record below, 9a, 11a).

The District Court dismissed the libel, finding no unseaworthiness.

The Second Circuit affirmed.

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[1] This is the same question now pending in *Massa* v. *Ca. Venezuelan Navigacione*, No. , Oct. Term, 1964.

Reasons for Granting the Writ

The two Circuits, the Second and Third, carrying the major burden of maritime litigation in this country are in direct conflict with each other as to the proper standard to apply in determining liability for maritime accidents proximately caused by negligent and non-negligent stevedore operations.

Not only is the Court of Appeals for the Second Circuit in conflict with the Third, as aforesaid, but in addition thereto, the holding in the instant case is inconsistent with the holding of this Court in the case of *Gutierrez* v. *Waterman, supra*, p. 2.[1]

The present situation does violence to the American concept of equal justice to all; in that cases tried in one district result in an award of damages against a shipowner, whereas on the identical facts, the shipowner is granted immunity from liability if tried in another district.

To permit this unsettled state of the law to continue without clarification and settlement by this Court would encourage injured workers and/or their dependents to shop around for a more favorable forum in which to litigate their rights and thus inevitably result in unequal administration of justice on identical factual situations.

This lack of uniformity, which presently exists, merits clarification by this Court, not only in the interest of the victims of maritime disasters but, likewise, to establish the nature and extent of a shipowner's obligations. The desire for uniformity in treating with maritime problems is important to all parties concerned with maritime accident

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[1] There is also an intra-circuit conflict which merits this Court's review.

This Court has granted *certiorari* to bring about uniformity within a Circuit.

[continued on page 4]

liability throughout the nation. The fact that this question is of national importance to the entire industry is highlighted by the fact that opposing interests are asking this Court, as is this petitioner, to clarify and settle the question presented. See petitions for certiorari pending in *Swedish American Lines* v. *Ferrante* (No. 275, Oct. Term, 1964), *Calmar S. S. Corp.* v. *Thompson* (No. 398, Oct. Term, 1964) and *Massa* v. *Ca. Venezuelan Navigacione* (No. October Term, 1964).

Shipowners' interests in the two above cited petitions, *supra*, state that the decision in the instant case is in conflict with holdings by other courts in *Blankenship* v. *Ellerman's Wilson Line* (4 Cir.), 265 F. 2d 455, and *Arena* v. *Luckenbach S. S. Co.*, (1 Cir.), 279 F. 2d 186, cert. den. 364 U. S. 895.

POINT I

The holding of the Court below is inconsistent with this Court's prior decision.

The decision in the instant case has applied principles of law in a manner inconsistent with that given by the Supreme Court of the United States in the case of *Gutierrez* v. *Waterman*, 373 U. S. 206, 83 S. Ct. 1185.

[continued from page 3]

John Hancock Ins. Co. v. *Bartels*, 308 U. S. 180, 60 S. Ct. 221; *Dickinson* v. *Petroleum Conversion Corp.*, 338 U. S. 507, 70 S. Ct. 322

As to the intra-circuit conflict in the Second Circuit, see also:

Pinto v. *States Marine Corp.*, 286 F. 2d 1, *en banc* hearing denied, dissenting opinion by CLARK, C.J., SMITH, C.J. concurring in dissent, cert. den. 369 U. S. 843, rehearing denied, 369 U. S. 891; *Ezekiel* v. *Uoiusia S.S. Co.*, 297 F. 2d 215; CLARK, C.J., dissenting, cert. den. 369 U. S. 843, rehearing denied, 369 U. S. 891.

POINT II

Inter-Circuit conflict merits this Court's certiorari review.

John Hancock Ins. Co. v. *Bartels*, 308 U. S. 180, 60 S. Ct. 221;
Dickinson v. *Petroleum Conversion Corp.*, 338 U. S. 507.

The decision below is in conflict with the holding by the Third Circuit in the cases of *Ferrante* v. *Swedish American Lines*, 331 F. 2d 571, and *Thompson* v. *Calmar S. S. Corp.*, 331 F. 2d 657.

The court below, contrary to the above holdings, predicated its decision on control by the stevedore and the negligence of the plaintiff and his fellow-workman.

The decision below, therefore, destroys the uniform application of principles of maritime law.

POINT III

Intra-Circuit conflict merits this Court's certiorari review.

The court below has enunciated a radical principle of law in conflict with its prior holding in *Grillea* v. *U. S.* (2 Cir.), 232 F. 2d 919, approved by this court in *Reed* v. *Yaka*, 373 U. S. 410, 83 S. Ct. 1349.

POINT IV

Certiorari review is necessary to re-establish and maintain the desired uniformity of the General Maritime Law.

The decision by the court below destroys the uniformity of the maritime law. It is inconsistent with the holding in the *Gutierrez* case, *supra;* conflicts with the decisions in

the Third Circuit in *Thompson, supra*, and *Ferrante, supra*, and conflicts with the prior decision in its own circuit in *Grillea, supra*.

This places an unwarranted burden upon personal injury victims, and next of kin in fatal accidents, and encourages the shopping around for a more favorable forum.

CONCLUSION

It is respectfully submitted that, for the foregoing reasons, certiorari review is merited herein in order to maintain the uniformity of the general maritime law.

Wherefore, petitioner respectfully prays that this court's writ of certiorari will issue to the United States Court of Appeals for the Second Circuit to review its subject order and judgment and further prays that, on certiorari being granted, this court will reverse the order of the court below.

Respectfully submitted,

JACOB RASSNER,
Counsel for Petitioner.

APPENDIX

Judgment Appealed From

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held the United States Courthouse in the City of New York, on the twenty-fifth day of June, one thousand nine hundred and sixty-four.

Present:

HON. STERY R. WATERMAN,
HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH,
Circuit Judges.

NICHOLAS GUARRACINO,

Libellant,

v.

LUCKENBACH STEAMSHIP COMPANY, INC.,
Respondent-Appellant,

TURNER & BLANCHARD, INC.,
Respondent-Impleaded-Appellee.

LOUIS NAPOLI,

Libellant,

v.

LUCKENBACH STEAMSHIP COMPANY, INC.,
Respondent-Appellant,

TURNER & BLANCHARD, INC.,
Respondent-Impleaded-Appellee.

Appeal from the United States District Court for the Southern District of New York.

Judgment Appealed From

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court as to libellant appellant, Guarracino, be and it hereby is affirmed.

Further ordered, adjudged and decreed that the judgment dismissing the indemnity claim of the Luckenbach Steamship Co., be and it hereby is reversed and that the action be and it hereby is remanded for entry of judgment on the shipowner's claims for indemnity for the expenses of defending Guarracino's and Napoli's actions at trial and in defending against Guarracino's appeal including reasonable attorney's fees withcosts to Luckenbach Steamship Co., in accordance with the opinion of this court.

A. Daniel Fusaro,
Clerk.

Opinion of Circuit Court of Appeals

Before WATERMAN, FRIENDLY and SMITH, Circuit Judges.
J. JOSEPH SMITH, Circuit Judge.

Guarracino, a longshoreman employed by the stevedoring firm of Turner & Blanchard, Inc., was injured in a fall while attempting to climb from the hatch of a ship owned by the Luckenbach Steamship Co., Inc. He brought suit against Luckenbach, which impleaded Turner and Blanchard. This case and a companion case were consolidated for trial in the admiralty, diversity not being present. On trial to the court in the Southern District of New York, Richard H. Levet, District Judge, the court held the sole cause of the accident libelant's negligence, found no unseaworthiness and no negligence on the part of the shipowner or stevedore, and dismissed the action and the third party claims for indemnity. Guarracino and Luckenbach appeal from these determinations; Napoli did not. We agree that there was no unseaworthiness and no negligence on the part of the ship owner and affirm the judgment dismissing libelant's action. We disagree with the determination that the stevedore was not liable for the cost of defense on the facts found, and reverse and remand for determination of the costs and expenses of defense of the action including reasonable attorney's fees on trial and on appeal.

[1, 2] Guarracino was a member of a hatch gang, bossed by his father, that was unloading a cargo of canned goods in cartons in the #4 lower hold of the S.S. Marine Snapper, when the whistle blew a few minutes before quitting time. The hatch boss had sent for one of the several portable ladders available on the ship, and had left the scene, telling the men to wait. The instructions by the stevedore to the hatch boss required the hatch boss to await the arrival of a ladder when one was ordered. A fixed ladder in a verti-

cal shaftway at the forward end of the hatch opening was accessible at the time. Libelant and a fellow longshoreman, rather than wait for the portable ladder or walk a short distance to the fixed ladder, climbed a stack of cartons. Guarracino succeeded in getting one leg over the edge of the hatch opening when he slipped and fell, the other longshoreman falling with him, and both were injured. These factual findings were soundly based on competent evidence before the court and plainly justify the findings that the ship was neither unseaworthy nor negligent. The ship breached no duty to Guarracino, and since it was properly equipped with fixed and portable ladders to permit safe egress from the hatch, it cannot be termed unfit for its intended service. The case is readily distinguishable from the recent decisions of the Third Circuit,[1] brought to our attention by libelant's counsel after oral argument, that espouse the view that the longshoremen's negligent use of the ship's equipment to create an unsafe condition may make the ship unseaworthy. Here the accident was caused by the longshoreman's negligence in failing to use the ship's seaworthy equipment. Of course, this negligence would not be an absolute bar to recovery if the ship had been negligent or unseaworthy, but it cannot by itself convert a seaworthy ship into an unseaworthy one or a non-negligent shipowner into a negligent one. No unsafe condition was created, for the cartons were never intended to serve as a ladder. It is no answer to say, as libelant does, that longshoremen are habitually careless.

[3] The determination that the ship was neither negligent nor unseaworthy does not, however, relieve the stevedore from liability to the shipowner for breach of warranty

[1] Ferrante v. Swedish American Lines, 331 F. 2d 571 (3 Cir. 1964); Thompson v. Calmar Steamship Corp., 331 F. 2d 657 (3 Cir. 1964).

of workmanlike service. Recovery over may be had even if the shipowner is exonerated from fault or unseaworthiness. Strachan Shipping Co. v. Koninklyke Nederlandsche S. M., N. V., 324 F. 2d 746 (5 Cir. 1963), cert. denied 84 S. Ct. 969 (1964); Massa v. C. A. Venezuelan Navigacion, 332 F. 2d 779 (2 Cir. 1964). Potential liability is sufficient. Damanti v. A/S Inger, 2 Cir. 1963, 314 F. 2d 395, cert. denied; Daniels & Kennedy, Inc. v. A/S Inger, 375 U. S. 834, 84 S. Ct. 46, 11 L. Ed. 2d 64 (1963). While the shipowner has been successful in defense of the main action, he has suffered loss, in the form of attorney's fees and expenses in the defense, caused by the actions of the stevedore's employees in two respects which we hold were in breach of the stevedore's warranty of workmanlike service. These are the abandonment of his post by the hatch boss in the face of his general instructions to stay at a hatch until a ladder was brought, and the action of libelant, when a safe alternative was available, in taking a way out likely to cause injury to himself and his fellow worker. For these losses a stevedore is liable on its warranty. Damanti v. A/S Inger, supra; Paliaga v. Luckenbach Steamship Co., 2 Cir. 1962, 301 F. 2d 403; DeGioia v. United States Lines Co., 2 Cir. 1962, 304 F. 2d 421; and see Nicroli v. Den Norske, etc., 2 Cir. 1964, 332 F. 2d 651 and Massa v. C. A. Venezuelan Navigacion, supra. This rule would apply even if the unsafe conduct was that of the injured longshoreman alone. Damanti v. A/S Inger, supra. This is as it should be, for it is the stevedore in direct control of the hatch boss and the worker, who can best avoid the injury and expense by insistence on observance of safety precautions.

We therefore reverse and remand for entry of judgment on the shipowner's claims for indemnity for the expenses of defending Guarracino's and Napoli's actions at trial and in defending Guarracino's appeal, including reasonable attorney's fees.

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Petitioner presents this case in an entirely false light; the QUESTION PRESENTED is not what he says it is.

Petitioner tells this Court that he was caused to fall

> "• • • through respondent's failure to have a reasonably safe means of exit from the hatch where petitioner was performing his work aboard the vessel" (Petition, p. 2).

But the District Court's Findings were precisely to the contrary and the Court of Appeals affirmed that "These factual findings were soundly based on competent evidence" (Petition, p. 10).

The District Court found that

> "• • • a passageway to the forward interior ladder was available for use at the time of the accident • • •"

and that

> "* * * the longshoremen in D-deck, including the libellants, could have used this interior ladder to leave the hatch when the whistle blew, if they so desired, without moving any cargo" (Petitioner's appendix below, Vol. I, p. 39a).

In addition, the District Court found that an available portable ladder was being procured; that petitioner and his co-libellant had been instructed by their hatch boss to wait in the hold until the ladder arrived; that the men were paid for working until 5 P.M. but that the stevedore foreman blew the whistle between 4:45 and 4:50 P.M., and that

> "* * * libellants, without waiting for the portable ladder they requested and which they had been told was on its way, and in defiance of their hatch boss' order to 'hold tight', immediately tried to leave D-deck by climbing on a pallet of cargo about 5 feet high. It was while standing atop this cargo and attempting to climb upon C-deck that the accident occurred" (Petitioner's appendix below, Vol. I, p. 38a).

Petitioner withdrew his negligence claim during the trial and the District Court found on the proofs submitted by both parties that defendant's vessel was seaworthy. The District Court's ultimate finding of fact was as follows:

> "I find that the proximate cause of libellants' accident was their failure to make use of the available interior forward ladder or to wait a reasonable time for the production of the portable ladder which they requested and which they were informed was being obtained. Instead of doing either, as soon as the whistle blew and in defiance of the hatch boss' order to 'hold tight', they attempted to climb out of the hatch by manner of their

own choosing. Luckenbach cannot be held liable nor can its vessel be found unseaworthy" (Petitioner's appendix below, Vol. I, p. 39a).

The Court of Appeals said:

"A fixed ladder in a vertical shaftway at the forward end of the hatch opening was accessible at the time. Libellant and a fellow longshoreman, rather than wait for the portable ladder or walk a short distance to the fixed ladder, climbed a stack of cartons. Guarracino succeeded in getting one leg over the edge of the hatch opening when he slipped and fell * * *" (Petition, pp. 9-10).

The Court of Appeals continued:

"These factual findings were soundly based on competent evidence before the Court and plainly justify the findings that the ship was neither unseaworthy nor negligent" (Petition, p. 10).

On the *facts* of this case, as distinguished from petitioner's *assertions*, there is no conflict with *Ferrante* v. *Swedish American Lines*, 3 Cir., 331 F. 2d 571,* or *Thompson* v. *Calmar Steamship Corporation*, 3 Cir., 331 F. 2d 657, or with *Gutierrez* v. *Waterman*, 373 U. S. 206. In its opinion in this case, the Court of Appeals itself distinguished *Ferrante* and *Thompson* saying:

"The case is readily distinguishable from the recent decisions of the Third Circuit, brought to our attention by

[1] Ferrante v. Swedish American Lines, 331 F. 2d 571 (3 Cir. 1964); Thompson v. Calmar Steamship Corp., 331 F. 2d 657 (3 Cir. 1964)" (Petition, p. 10).

* The petition for certiorari, No. 275, Oct. Term 1964, has been withdrawn.

libellant's counsel after oral argument, that espouse the view that the longshoreman's negligent use of the ship's equipment to create an unsafe condition may make the ship unseaworthy. Here the accident was caused by the longshoreman's negligence in failing to use the ship's seaworthy equipment. Of course, this negligence would not be an absolute bar to recovery if the ship had been negligent or unseaworthy, but it cannot by itself convert a seaworthy ship into an unseaworthy one or a non-negligent shipowner into a negligent one. No unsafe condition was created, for the cartons were never intended to serve as a ladder."

In *Thompson*, there was a factual finding of unseaworthiness where ship's equipment was negligently used as a battering ram in shifting various shoreside freight cars with resulting injury to a longshoreman on the dock.

Gutierrez is as far afield as the South Pole is from the North. There the longshoreman was injured when he slipped on loose beans strewn on the dock which had spilled from their bags during the unloading of the vessel. This Court sustained the District Court's findings that these bags were defective and unseaworthy, stating:

"* * * cargo containers must be reasonably fit for the purpose for which they are to be used. * * * A ship that leaks is unseaworthy; so is a cargo container that leaks. * * * Beans belong inside their containers. * * * These bean bags were unfit and thus unseaworthy" (pp. 213-214).

But the District Court, in the present case, made factual findings on competent evidence, and the Circuit Court agreed, that petitioner had a reasonably safe means of leaving the hold, there was no defective condition, and the vessel was seaworthy.

It is quite apparent that this case is not at all in conflict with either *Thompson* or *Gutierrez*, much less are the "facts identical" (Petition, p. 3).

Nor is there any conflict within the Second Circuit. In *Grillea* v. *United States*, 232 F. 2d 919, Judge Hand upheld a damage award to a longshoreman caused by a misplaced and defective hatchboard, but recognized that

> "* * * each case must turn on its particular circumstances" (p. 922)

and illustrated by referring to *Berti* v. *Compagnie*, 2 Cir., 213 F. 2d 397, where a strongback was dislodged by a winchman, and *Manhat* v. *United States*, 2 Cir., 220 F. 2d 143, cert. denied 349 U. S. 966, where a boat was dropped from its davits by a carelessly turned lever; recovery was denied in both of these instances. And, similarly, the Second Circuit has found *Grillea* inapplicable and denied recovery in other longshoremen cases without "enunciating a radical principle of law" (Petition, p. 5). *Hooper* v. *Terminal Steamship Company*, 296 F. 2d 281, cert. denied 369 U. S. 843; *Paddu* v. *Royal Netherlands Steamship Company*, 303 F. 2d 752, cert. denied, 371 U. S. 840; *Spinelli* v. *Isthmian Steamship Company*, 326 F. 2d 870, cert. denied 377 U. S. 935, petition for rehearing denied, 377 U. S. 1010, motion for 2nd rehearing denied, —— U. S. ——, 32 L. W. 3132, October 13, 1964.

This case is of no intrinsic or general importance; its outcome will affect only these litigants and will be of no consequence to others.

This Court's attention is not merited and the petition should be denied.

Respectfully submitted,

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